

Decision 06-01-044 January 26, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WilTel
Communications, LLC (U-6146-C) aka Williams
Communications, LLC, a Delaware Limited Liability
Company, to Amend its Certificate of Public
Convenience and Necessity.

Application 04-05-017
(Filed May 3, 2004)

**ORDER MODIFYING DECISION (D.) 05-07-042 AND DENYING
REHEARING OF D.05-07-042 AS MODIFIED**

On August 25, 2005, the California Attorney General ("Attorney General") filed an application for rehearing of Decision (D.) 05-07-042 ("Decision"). In D.05-07-042, the Commission granted WilTel Communications, LLC's ("WilTel's") request to amend its certificate of public convenience and necessity ("CPCN") as a non-dominant interexchange carrier ("NDIEC"). In its application and subsequent amendment, WilTel requested that its CPCN be amended to allow it to construct and operate fiber optic telecommunications facilities within existing rights of way less than five miles in length without obtaining further Commission approval and review. As originally issued, the Decision grants this request.

We have carefully considered all arguments presented by the Attorney General, and have reevaluated our Decision in light of these arguments. We conclude that errors in the Decision's reasoning warrant substantial modification of the Decision. However, as discussed, the arguments do not provide sufficient basis for us to alter our ultimate conclusions concerning whether the WilTel construction projects in question must undergo Commission and California Environmental Quality Act (CEQA) review.

Accordingly, in this order we modify the Decision, and deny rehearing of the Decision as modified. We emphasize that, although we are changing the Decision's reasoning, the final result of our modification will allow WilTel substantially the same authority as the original Decision.

In its application for rehearing, the Attorney General argues that the Commission's Decision to allow WilTel to construct certain facilities without further review violates the CEQA. The Attorney General further maintains that none of the Decision's proffered reasons to excuse WilTel from environmental review justify failing to meet the CEQA requirements.

The Attorney General's arguments indicate that it does not fully understand the intended reasoning of the Decision. We concede that the Decision and the Commission's earlier holdings concerning WilTel have not been consistent. To be clear, the basis for the Commission's conclusion that WilTel need not undergo Commission or environmental review for further construction is that there are no restrictions in WilTel's Certificate of Public Convenience and Necessity ("CPCN") and, therefore, there is no legal requirement that WilTel obtain additional Commission authorization prior to constructing.

The Attorney General suggests that our conclusions that WilTel's CPCN allows it to undertake additional construction, and that WilTel's authority is not "limited to specified construction projects," are "disingenuous." (Attorney General App. for Reh., at pp. 5-6.) The Attorney General fails to understand that these conclusions regarding WilTel's authority are a result of Public Utilities Code section 1001, rather than simply how the Commission has viewed the CPCN. As we explain in the modified Decision we are issuing today, section 1001 requires utilities to obtain a CPCN from the Commission prior to commencing service and building necessary facilities. As part of the review for these original CPCNs, the Commission reviews the need for the facilities and undertakes necessary CEQA review. However, section 1001 also allows utilities, after obtaining

initial CPCNs from the Commission, to extend their facilities within their existing service territories without obtaining further approval from the Commission. (Pub. Util. Code, § 1000.) In other words, once a utility has obtained a CPCN, section 1001 does not require it to return for permission to construct extensions within its service territory. Therefore, contrary to the Attorney General's assumptions, unless the CPCN, or some other authority specifically requires it, a utility is not required to apply to the Commission to build these extensions to its facilities. (See *H.B. Ranches* (1983) 11 Cal.P.U.C.2d 400, 1983 Cal. PUC LEXIS 460.)

In this case, despite the fact that WilTel's CPCN only analyzes the specific projects that WilTel had planned at the time it began service, the CPCN does not contain restrictions on WilTel's future construction. (*Williams Communications, Inc.* (1999) [D.99-10-062] 1999 Cal. PUC LEXIS 723.) Pursuant to section 1001, therefore, WilTel is authorized to expand its facilities without further Commission review. Furthermore, there is no other law or rule that would require WilTel to return for Commission approval in order to expand its facilities, and the Attorney General has not identified any such requirement. Because no discretionary approval of WilTel's extension construction is required, this construction is not a discretionary project, and it is therefore not subject to the CEQA environmental review requirements. (Pub. Resources Code, § 21080 (a).) For these reasons, our conclusion that WilTel need not obtain further Commission approval is based on the application of Public Utilities Code section 1001 to the facts at hand. There is no basis for the Attorney General's assertion that our holdings are disingenuous.

Moreover, contrary to the Attorney General's arguments, we do not mean to suggest that the competitive disadvantage WilTel may suffer by undergoing additional Commission review, excuses WilTel or the Commission from CEQA compliance. Rather, as discussed, the Commission's basis for concluding that WilTel may proceed with certain additional construction without further Commission review is that there is no requirement that WilTel obtain Commission approval for this construction, and therefore

the CEQA requirements are not *triggered*. Most of the other discussion in the Decision explains certain policy implications of this legal result. However, the Decision's discussion of the Commission's disparate treatment of WilTel is not essential to the Commission's CEQA conclusions. Because this discussion confuses the relatively limited legal issues concerning Commission and CEQA review, we will omit the portions of the Decision that discuss potentially discriminatory treatment of WilTel.

We concede that, despite the application of Public Utilities Code section 1001 to the case at hand, the Commission has been inconsistent in the past regarding whether WilTel is required to return to the Commission for additional approval. (See *Williams Communications, Inc.* [D.00-08-017] 2000 Cal. PUC LEXIS 559.) We are aware that even WilTel assumes in its current application that its CPCN requires it to return to the Commission for approval prior to constructing additional facilities. These misunderstandings stem in large part from the changes which had been occurring in Commission review of telecommunications facilities around the time that WilTel obtained its CPCN. (See, e.g., *Competition for Local Exchange Service* (1999) [D.99-12-050] 1999 Cal. PUC LEXIS 787; *Competition for Local Exchange Service* (1995) [D.95-07-05] 1995 Cal. PUC LEXIS 604.) However, these requirements never applied to WilTel in part because WilTel is a NDIEC rather than a Competitive Local Carrier ("CLC). (See, e.g., *Registration Process for NDIECs* (1997) [D.97-06-107] 1997 Cal. PUC LEXIS 535.) Moreover, WilTel's CPCN predated the Commission's adoption of more limited CPCN authority for CLCs. (D.99-12-050, *supra*, 1999 Cal. PUC LEXIS 787.) Even though the Commission incorporated limitations into CPCNs for many telecommunications carriers who began service after D.99-12-050, WilTel's CPCN contains none of these restrictions.

In short, regardless of the Commission's past inconsistencies interpreting the scope of WilTel's authority, WilTel's authority to construct expansions is not limited by WilTel's CPCN, or by any other source of law.

We also note that the Decision is mistaken in granting WilTel's application to amend its CPCN to remove restrictions while at the same time holding that WilTel's CPCN does not contain restrictions. To correct this, we will modify the Decision to deny WilTel's application on the grounds that its current CPCN contains no restrictions on future expansions. We are mindful, however, that despite the fact that we conclude that WilTel is legally able to construct any expansions within its territory, it is undesirable from an environmental policy point of view to allow WilTel to have unfettered discretion to construct without additional Commission review. For this reason, we will affirmatively add the restrictions that were outlined in WilTel's amended application. That is, although WilTel's CPCN previously provided unlimited authority to construct expansions within its service territory, now WilTel must return to the Commission for approval prior to constructing additional fiber optic and related facilities which are more than five miles in length or outside of existing rights of way. We will also require WilTel to notify Commission staff concerning all new construction it undertakes.

We acknowledge that the larger issue of disparate treatment of similarly situated telecommunications carriers has not been solved in this proceeding. We note the urgent need to resolve the issues in Rulemaking (R.) 00-02-003, concerning industry-wide CEQA review standards for telecommunications carriers, as expeditiously as possible.

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Therefore **IT IS ORDERED** that:

1. The text of D.05-07-042 is deleted, and is replaced with the text of Appendix 1.
2. Rehearing of D.05-07-042, as modified herein, is denied.
3. This proceeding is closed.

This order is effective today.

Dated January 26, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

I dissent.

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown

I reserve the right to file a dissent.

/s/ DIAN M. GRUENEICH
Dian M. Grueneich